

IN THE COURT OF APPEALS FOR THE
TENTH DISTRICT OF TEXAS AT WACO

ROBERTO ESCOBAR HERNANDEZ

Appellant

v.

THE STATE OF TEXAS

Appellee

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FILED IN
10th COURT OF APPEALS
WACO, TEXAS

12/20/2019 11:39:00 AM

NITA WHITENER
Clerk

No. 10-19-00252-CR

APPEAL FROM THE 13TH JUDICIAL DISTRICT COURT OF NAVARRO COUNTY, TEXAS

THE HONORABLE JAMES LAGOMARSINO, JUDGE PRESIDING

§§§

APPELLEE'S BRIEF

§§§

ORAL ARGUMENT

NOT REQUESTED

WILLIAM JAMES DIXON

Criminal District Attorney

Navarro County

ROBERT LINUS KOEHL

Assistant District Attorney

300 W. 3rd. Ste. 301

Corsicana, TX 75110

Phone: 903-654-3052

Fax: 903-872-6858

State Bar No. 24097948

rkoehl@navarrocounty.org

IDENTIFICATION OF INTERESTED PARTIES

Appellee, the State of Texas, adopts Appellant's identification of parties and counsel.

TABLE OF CONTENTS

	Page
IDENTIFICATION OF INTERESTED PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX OF AUTHORITIES.....	v
STATEMENT REGARDING ORAL ARGUMENT.....	1
ISSUE PRESENTED.....	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT AND AUTHORITIES.....	2
PRAYER.....	7
CERTIFICATE OF SERVICE/COMPLIANCE.....	8

INDEX OF AUTHORITIES

Page(s)

CASES

<i>Bottenfield v. State,</i> 77 S.W.3d 349 (Tex. App.—Ft Worth 2002, pet. ref'd).....	4
<i>Evans v. State,</i> 299 S.W.3d 138 (Tex. Crim. App. 2009).....	4
<i>Ex parte Watson,</i> 306 S.W.3d 259 (Tex. Crim. App. 2009).....	3
<i>Guzman v. State,</i> 955 S.W.2d 85 (Tex. Crim. App. 1997).....	3
<i>Hall v. State,</i> 225 S.W.3d 524 (Tex. Crim. App. 2007).....	2
<i>Hutchins v. State,</i> 992 S.W.2d 629 (Tex. App.—Austin 1999, pet ref'd).....	4
<i>Ochoa v. State,</i> 982 S.W.2d 904 (Tex. Crim. App. 1998).....	4-5
<i>Pizzo v. State,</i> 235 S.W.3d 711 (Tex. Crim. App. 2007).....	3
<i>State v. Meru,</i> 414 S.W.3d 159 (Tex. Crim. App. 2013).....	2

iv

Cause No. 10-19-00252-CR; Roberto Escobar Hernandez v. State of Texas; In the 10th Court of Appeals, State of Texas

APPELLEE’S BRIEF

INDEX OF AUTHORITIES (cont'd)

Page(s)

CASES (CONT'D)

Taylor v. State,

Nos. 09-16-00303-CR & 09-16-00307-CR; 2018 Tex. App. LEXIS 3426

(Tex. App.—Beaumont May 16, 2018, pet. ref'd).....4

RULES/STATUTES

TEX. CODE CRIM. P. ART. 37.09.....2-3, 6

TEX. PENAL CODE § 22.021.....*passim*

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. The law is well developed on this case's salient issues. Oral argument would not assist the Court in developing these issues. The State respectfully requests that the Court submit the case on briefs alone.

ISSUE PRESENTED

A lesser-included offense instruction is appropriate when “the same or less than all the facts required to establish” the charged conduct constitute a lesser-included offense. Such an instruction is not appropriate when evidence of the lesser charge is distinct from that supporting the charged offense. Appellant was charged with penetrating a child's mouth with his sexual organ. He introduced evidence that he touched her sexual organ, which would be a separate offense. Did the trial court abuse its discretion by denying Appellant's request for a lesser-included jury instruction?

SUMMARY OF THE ARGUMENT

A lesser-included instruction is only appropriate if evidence would allow a jury to find the defendant guilty of only the lesser-included offense using the same or less than all the facts required to establish the charged conduct. When one act

proves both offenses, indecency with a child can be a lesser-included of aggravated sexual assault. But when the evidence supporting an indecency charge is distinct from that supporting the aggravated sexual assault, the indecency charge will not be a lesser included offense. Here, Appellant was charged with penetrating a child's mouth with his sexual organ. He introduced evidence that he touched her sexual organ, which would be a separate and distinct offense from the charged conduct. Accordingly, he was not entitled to a jury instruction on indecency with a child.

ARGUMENT AND AUTHORITIES

Courts determine the availability of a lesser included offense instruction via a two-step test. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). In conducting this two-step analysis, courts determine: (1) whether the elements of the lesser-included offense are included within the proof necessary to establish the elements of the charged offense and (2) whether there is evidence in the record that could allow a jury to find the defendant guilty of only the lesser-included offense. *See Meru*, 414 S.W.3d at 162-63. An offense is a lesser-included offense if “it is established by proof of the same or less than all the facts required to establish the commission of the offense

charged.” TEX. CODE CRIM. P. art. 37.09(1). Both (1) the statutory elements and (2) any manner and means alleged in the indictment for the charged offense should be compared to the lesser offense. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009).

Courts review the first step de novo. *Guzman v. State*, 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997). A person commits aggravated sexual assault of a child under the age of fourteen, if the person intentionally or knowingly: causes the penetration of the anus or sexual organ of a child by any means or causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor. TEX. PENAL CODE § 22.021(a)(1)(B)(i), (iv). A person commits the offense of indecency with a child if, with intent to arouse or gratify sexual desire, the person (a) touches the child's anus, (b) touches the child's breast, (c) touches the child's genitals, (d) touches the child with the person's anus, (e) touches the child with the person's breast, or (f) touches the child with the person's genitals. *Id.* at § 21.11(c). Each of these forms of contact constitutes a distinct and separate offense because indecency with a child is a conduct-oriented offense. *See Pizzo v. State*, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007).

Courts review the second step under an abuse of discretion standard. *Taylor v. State*, Nos. 09-16-00303-CR & 09-16-00307-CR; 2018 Tex. App. LEXIS 3426 (Tex. App.—Beaumont May 16, 2018, pet. ref'd) (not designated for publication). When one act proves both offenses, courts have held indecency with a child to be a lesser included offense of aggravated sexual assault. *See, e.g., Evans v. State*, 299 S.W.3d 138, 143 (Tex. Crim. App. 2009); *Ochoa v. State*, 982 S.W.2d 904, 908 (Tex. Crim. App. 1998). In contrast, when the evidence supporting an indecency charge is distinct from that supporting the charge of aggravated sexual assault, the indecency charge will not be a lesser included offense of the aggravated sexual assault. *See, e.g., Bottenfield v. State*, 77 S.W.3d 349, 358 (Tex. App.—Fort Worth 2002, pet. ref'd) (explaining that evidence showed appellant touched one of the victims inappropriately twice, thus supporting convictions for both aggravated sexual assault and indecency).

In the present case, the State does not contest the first step. The charged conduct was that Appellant (1) intentionally or knowingly (2) caused the penetration of the child's mouth by Appellant's sexual organ, and (3) the child was younger than 14 years of age. *See* 3 RR 19-20; TEX. PENAL CODE §§ 22.011(a)(2), 22.021(a)(2)(B). Indecency with a child could therefore be a lesser-included offense

if evidence were presented that he touched the child with his sexual organ if the same act could prove both offenses. *See Ochoa*, 982 S.W.2d at 908; *see also* TEX. PENAL CODE § 21.11(c)(2).

But Appellant was not entitled to a lesser-included instruction because he presented evidence which would constitute separate and distinct acts, not a lesser-included offense. Appellant admitted to touching the child's genitals. 4 RR 18-21. This was separate and distinct from the charged conduct, which was penetrating the child's mouth with the defendant's sexual organ. *See* 3 RR 19-20. Touching the child's sexual organ is a separate and distinct act from touching the child with Appellant's sexual organ. *See Hutchins v. State*, 992 S.W.2d 629, 633 (Tex. App.—Austin 1999, pet ref'd) (finding touching the victim's genitals to be a distinct act from penetration with the defendant's penis). The two offenses cannot be proven by the same act. Accordingly, Appellant was not entitled to a lesser-included offense under the second step of the analysis.

Further, there was no evidence admitted that Appellant merely touched the victim with his genitals in a manner which would be “the same or less than all the facts required to establish” the charged conduct. He did say that he took his pants off and pulled her close to him and rubbed their bodies together. 4 RR 21. But

5

Appellant denied touching her with his penis. *Id.* at 41. He admitted that his penis could have inadvertently touched her body at some point when he hugged her, but he denied any willful touching of any part of her body with his penis. *Id.* at 98-101. Vacillating between outright denial and admitting a possibility that something inadvertently happened does not rise to the level of offering evidence that something did actually happen. Further, the possible inadvertent contact he described was nowhere near her mouth or facial area. *See Id.* at 98-100. Hence, there was no evidence from which the jury could have found that indecency with a child happened under “the same or less than all the facts required to establish” the offense as charged. *See* TEX. CODE CRIM. P. art. 37.09(1). Accordingly, Appellant was not entitled to a lesser-included instruction on indecency with a child.

Appellant erroneously argues that he was entitled to a lesser-included instruction because he raised “a valid, rational alternative to the charged offense” with testimony that another person assaulted the victim in the manner alleged. Appellant’s Br. 10. This argument makes no sense. Evidence that someone other than Appellant committed an offense with the same victim does not entitle Appellant to a lesser-included instruction. That would be absurd.

For these reasons, the 13th Judicial District Court did not abuse its discretion by denying Appellant's request for a lesser-included instruction. As such, this Court should overrule his sole issue and affirm.

PRAYER

The evidence supporting an indecency charge was distinct from that supporting the alleged offense. Accordingly, a lesser-included instruction was not appropriate. As such, the trial court did not err by denying such an instruction. For this reason, this Court should overrule his Appellant's sole issue and affirm.

WHEREFORE PREMISES CONSIDERED, Appellee respectfully requests that this Court overrule Appellant's sole issue and affirm.

Dated: December 20, 2019


Respectfully submitted,



ROBERT LINUS KOEHL
State Bar No. 24097948
Assistant District Attorney
Navarro County

CERTIFICATE OF SERVICE

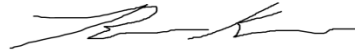
The State has e-served Shana Faulhaber, counsel for the Appellant, through the eFileTexas.gov filing system on the 20th day of December, 2019.



ROBERT LINUS KOEHL
State Bar No. 24097948
Assistant District Attorney
Navarro County

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations in Tex. R. App. P. 9.4(i)(2). In reliance on the word count provided by the computer program used to draft this brief, the undersigned attorney certifies that this brief contains 1,391 words.



ROBERT LINUS KOEHL
State Bar No. 24097948
Assistant District Attorney
Navarro County